Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

JEANETTE C. HOWER,

Petitioner,

v.

PACIFICARE OF CALIFORNIA AND
PACIFICARE HEALTH SYSTEMS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

ERISA's saving clause provides that ". . . *nothing in this subchapter* shall be construed to exempt or relieve any person from any law of any State which regulates insurance . . . ." 29 U.S.C. § 1144(b)(2)(A) (Emphasis added.)

Since ERISA's civil remedies provision is in the same subchapter as the saving clause, doesn't the language and structure of ERISA require that the remedies provision be subject to the saving clause, with the result that all state laws that regulate insurance are saved – even if they create a remedy that supplements ERISA's civil remedies?

LIST OF PARTIES

The petitioner is Jeanette C. Hower ("Hower").

The respondents are Pacificare of California and Pacificare Health Systems, Inc. ("Pacificare").

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PETITION FOR WRIT OF CERTIORARI

Hower respectfully requests that this Court issue a writ of certiorari to the review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The unpublished memorandum opinion of the Ninth Circuit is reprinted in the Appendix ("App.") at 1a. The district court's unpublished order dismissing Hower's case is reprinted at App. 4a.

JURISDICTION

The Ninth Circuits memorandum opinion was filed on May 2, 2002. This petition is timely filed within 90 days of that date. This Court has jurisdiction of this proceeding under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves the statutes and regulations set forth at Appendix C, App. 10a.

STATEMENT OF THE CASE

A. *Introduction*

The issue in this case is whether ERISA's civil remedies provision, § 502, preempts state laws that regulate insurance and therefore fall within the saving clause. In *Moran v. Rush Prudential HMO* __ U.S. __, 122 S.Ct. 2151, 2165 (2002) this Court suggested that if forced to choose between the States' rights to regulate insurance and the exclusivity of ERISA's remedies, the States' interest would yield. But this Court has yet to have to make that "forced choice." *Id.*

The choice was not required in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549 (1987), because the Court determined that the state law in question did not regulate insurance and therefore was not saved. Likewise, in *UNUM Life Ins. Co. v. Ward*, 526 U.S. 358, 119 S.Ct. 1380 (1999), and in *Moran*, the Court found that the law in question did regulate insurance, but did not create a new remedy and hence did not run afoul of ERISA's remedial scheme.

This case raises a direct conflict between the saving clause and the remedies provision. Here, unlike the Mississippi law in *Pilot Life*, California's common-law tort of insurance bad-faith meets the criteria for a state law that regulates insurance. The decision below did not suggest otherwise. Rather, the Court of Appeal determined that even if the law regulated insurance, it would be preempted because states

may not create remedies to supplement ERISA's remedial scheme.

Pilot Life and *Moran* plainly suggest that this view of ERISA's preemptive scope is correct. But neither decision, nor any of the Court's earlier decisions, acknowledge that the literal terms of the saving clause state that it takes precedence over all other provisions in "this subchapter." Since § 502 is in the same subchapter as the saving clause, it would seem that Congress plainly intended to save all state laws that regulated insurance from ERISA preemption, even state laws that augmented ERISA's civil remedies. Nothing in ERISA's legislative history suggests that Congress did not mean exactly what it said in the statute.

State-law based claims for "bad faith" are recognized as providing "an historical disincentive to insurance company misbehavior." *Amos v. Blue Cross-Blue Shield of Alabama*, 868 F.2d 430, 433 (11th Cir. 1989). The Court's expansive construction of ERISA's remedies clause removes this disincentive, effectively immunizing insurers in their dealings with ERISA plan participants and beneficiaries. The lower courts have frequently decried the injustices that result. See, e.g., *Cannon v. Group Health Serv. of Okla., Inc.*, 77 F.3d 1270, 1271 (10th Cir. 1996) ("Although moved by the tragic circumstances of this case and the seemingly needless loss of life that resulted, we conclude the law gives us no choice but to affirm [the grant of summary judgment to the insurer]"); *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1338 (5th Cir. 1992) ("The result

ERISA compels us to reach means the Corcorans have no remedy, state or federal, for what may have been a serious mistake").

The Court should grant certiorari here to reexamine the interplay between ERISA's saving clause and its remedies provision in light of the text of statute and its legislative history.

B. *Factual Summary*

In October 1999 Hower sought medical treatment through her PacifiCare medical group for symptoms including extreme fatigue, dizziness, shaking, and irregular heart palpitations. She was seen only by a nurse and was diagnosed with an ear infection.

Her symptoms became worse in December 1999, so she returned for treatment. At the time, she was demonstrating stroke-like symptoms. The medical group authorized blood work and an EKG, but refused to refer her to a specialist or to perform any additional tests. App. 2a.

Because she was unable to obtain access to a specialist, Hower was forced to go out-of-plan to UCLA and the Eisenhower Medical Center to obtain a diagnosis of Lyme disease. By the time she was diagnosed in March 2000, the illness had permanently damaged her heart. She now suffers from life-long residual effects from the Lyme disease.

C. *Proceedings Below*

Hower sued Pacificare in state court and Pacificare removed based on ERISA. App. 2a. Hower moved to remand, arguing that her claim for insurance bad-faith (tortious breach of the implied covenant of good faith and fair dealing) fell within the saving clause and was not preempted. App. 2a. The district court held that ERISA preempted Hower's claims and denied the motion to remand. App. 4a. The court granted Pacificare's motion to dismiss under Fed. R. Civ. Proc. R. 12(b)(6) for failure to state a claim on which relief can be granted. App. 2a.

Hower appealed the dismissal and petitioned the Ninth Circuit for en banc consideration of her appeal in the first instance, so it might reconsider its decision in *Kanne v. Connecticut General Life Ins. Co.*, 867 F.2d 489, (9th Cir. 1989) *cert. denied* (1989) 492 U.S. 906. The court declined to hear the case en banc. In an unpublished memorandum opinion it held that Hower's contention that ERISA did not preempt her claim for insurance bad-faith was inconsistent with *Pilot Life* and the Ninth Circuit's cases applying it. App. 3a. The court affirmed the dismissal.

REASONS THE PETITION SHOULD BE GRANTED

A. The Court's Decisions Do Not Acknowledge that ERISA is structured so that the saving clause trumps the remedies clause; not vice-versa

Hower is cognizant that the Court's ERISA jurisprudence, and particularly *Pilot Life*, state clearly that states may not create remedies that augment those available under ERISA, even if the state laws creating the new remedies regulate insurance and are therefore within the saving clause. The Court made this point most recently in *Moran*. See, e.g., 122 S.Ct. at 2165.

But *Moran* also recognized that the statements in *Pilot Life* concerning the interplay between the saving clause and the remedies provision were dictum, and that the Court had yet to encounter a case requiring it to make the "forced choice" between the saving clause and remedies provision. *Id.* That is, the Court has yet to decide a case where it was called on to determine whether a state law that fell within the savings clause was nevertheless preempted by § 502. This case does present that choice.

California's common-law tort of insurance bad-faith exists to regulate insurer conduct and is available only to policyholders. It therefore is an instrument of state regulation of insurance and satisfies all aspects of the Court's two-part test to discern which state laws fit within the saving clause.

Because the tort allows injured policyholders to recover not just the policy benefits that have been withheld, but also to recover compensatory damages and, if warranted, punitive damages, the tort creates a remedy that goes beyond what is available under ERISA.

While *Moran* and *Pilot Life* would suggest that the California law is therefore preempted by § 502, neither of those decisions, nor any others of which Hower is aware, square this result with the actual text of the saving clause – in particular the statement that, ". . . nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance . . . ." § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A).

Because § 502 is within the same subchapter as the saving clause, the saving clause can fairly be read to say that nothing in § 502 shall be construed to relieve or exempt any person from any law of a State that regulates insurance. The Court recently observed that when construing a statute, "[W]e begin with the understanding that Congress says in a statute what it means and means in a statute what it says there." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.* 530 U.S. 1, 6, 120 S.Ct. 1942, 1947 (2000). Under this fundamental view of statutory construction, it is difficult to see how the saving clause can be construed to yield to § 502.

The power of the express terms of the saving clause is reinforced by the Court's more recent decisions governing ERISA's preemptive

scope, which have stressed that ERISA's preemption provisions must be read against the presumption that Congress did not intend ERISA to supplant state law in areas that states have traditionally regulated. *New York State Conference of Blue Cross Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655, 115 S. Ct. 1671 (1995). This presumption should be particularly strong in the area of insurance regulation, given its inclusion in the saving clause.

Moran explains that the view that § 502 is unaffected by the saving clause is based on ERISA's structure and legislative history. 122 S.Ct. at 2164. With respect to the statutory structure, the Court has found that ERISA's civil remedies are "interlocking, interrelated and interdependent" and that Congress did not envision that the States could supplement them. *Id.* at 2165. Yet Congress unmistakably ceded the field of insurance regulation to the States in the saving clause with respect to anything contained in "this subchapter." This is consistent with the long-held Congressional recognition that insurance regulation is traditionally an area of state regulation.

The McCarran-Ferguson Act itself is an outgrowth of this long-held Congressional policy. *See Humana, Inc. v. Forsyth*, 525 U.S. 299, 306, 119 S. Ct. 710 (1999)("Congress' primary concern in enacting the McCarran-Ferguson Act was to ensure the States' continued ability to regulate the business of insurance.")

Given the language of the saving clause, it seems more accurate to say that ERISA is

structured so that the States are free to regulate insurance than it is to say that the remedies provision evinces a Congressional intent to foreclose some state regulation of insurance.

Nor does ERISA's legislative history reveal a clear congressional intent to preempt state regulation of insurance that may entail supplemental remedies. In *Pilot Life*, the Court relied on statements in the legislative history comparing ERISA's remedies clause with § 301 of the LMRA. 481 U.S. at 55. But the analogy between the LMRA and ERISA is suspect. There is no saving clause in the LMRA. And the LMRA governs the relationship between employers and labor unions – an entirely federal body of law. Congress' inclusion of the broadly-worded saving clause in ERISA clearly contemplated that state law would apply to insured ERISA plans.

ERISA's legislative history is bereft of any expression of a Congressional intent to supplant the States' right to fully regulate the field of insurance. ERISA was first and foremost a bill enacted to regulate employee pension plans. "ERISA was passed by Congress in 1974 to safeguard employees from the abuse and mismanagement of funds that had been accumulated to finance various types of employee benefits." *Massachusetts v. Morash*, 490 U.S. 107, 113, 109 S.Ct. 1668 (1989).

There is no evidence in ERISA's legislative history that "Congress seriously investigated, studied, or debated any issues or concerns with nonpension employee benefit plans." Bogan, *Protecting Patient Rights Despite ERISA: Will the*

Supreme Court Allow States to Regulate Managed Care?, 74 Tul.R.Rev. 951, 972 (2000). The Court commented on the absence of legislative history concerning the saving clause in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 745, 105 S.Ct. 2380 (1985)("[t]here is no discussion . . . of the relationship between the general pre-emption clause and the saving clause, and indeed, very little discussion of the saving clause at all.")

In *Metropolitan Life,* the Court therefore declined to impose any limitation on the saving clause beyond those Congress imposed in the clause itself. *Id.* at 746-747. The Court stated, "If a state law 'regulates insurance' . . . it is not pre-empted. Nothing in the language, structure, or legislative history of the Act supports a more narrow reading of the clause . . . ." *Id.*

Given Congress' direction that state substantive law is saved, it is not clear why Congress would have wanted to foreclose all access to state-created remedies or sanctions to enforce that substantive law, especially where the causes of action provided under § 502 itself are not suited to that purpose. For example, as the Solicitor General pointed out in its amicus brief to this Court in *Ward*, ERISA also saves "any generally applicable criminal law of a State." 29 U.S.C. § 1144(b)(4). This provision surely allows a State to bring a criminal prosecution, not merely to have its substantive law applied in a suit brought under ERISA.

There can be little question that ERISA's civil remedies scheme is unsuited to the purpose of preventing insurers from unfairly withholding

benefits from their insureds. In effect, ERISA creates incentives for improper conduct because there are no deterrents built into the remedies provision. Because no compensatory or punitive damages are available, insurers know that even if they improperly deny a claim, the worst that can happen is that they will be required to pay what they owe, and possibly interest and attorney's fees. The failure of this type of regulatory approach to deter insurer misconduct is the very reason that States have developed the tort of insurance bad-faith.

ERISA immunizes insurers from being held accountable for their misconduct, often with results that the lower courts have recognized as tragic. See, e.g., *Bast v. Prudential Ins. Co.*, 150 F.3d 1003, 1005 (1998) ("Although this case presents a tragic set of facts, the district court properly concluded that under existing law the Basts are left without a remedy"); *Andrews-Clarke v. Travelers Ins. Co.*, 984 F.Supp. 49, 52-53 (D. Mass. 1997) ("The tragic events set forth in Diane Andrews-Clarke's Complaint cry out for relief. . . . Under traditional notions of justice, the harms alleged . . . should entitle [her] to some legal remedy. . . . Nevertheless, this Court had no choice but to pluck [her] case out of the state court in which she sought redress (and where relief to other litigants is available) and then, at the behest of Travelers . . ., to slam the

courthouse doors in her face and leave her without any remedy.") (footnotes omitted).[1]

The statute does not require this result. The time has come for the Court to reevaluate its precedents concerning the preemptive scope of the remedies clause in light of the actual language that Congress used in the saving clause.

B. California's common-law tort of "insurance bad-faith" regulates insurance

Pilot Life held that Mississippi's common-law claim of "bad faith" did not regulate insurance and was therefore not saved. The Mississippi bad-faith claim was available for the breach of any contract and therefore could not be said to regulate insurance. California's common-law claim for insurance bad-faith is different. California permits tort recovery for breach of the implied covenant of good faith and fair dealing in only one situation — in an action brought by a policyholder against an insurer. *Freeman & Mills, Inc. v. Belcher Oil Co.*, 11 Cal.4th 85, 95, 102, 44 Cal.Rptr.2d 420, 425, 431 (1995).

Like the notice-prejudice rule at issue in *Ward*, which this Court held did regulate insurance, California's tort of insurance bad faith is "grounded on policy concerns specific to the insurance industry," *Ward*, 526 U.S. at 372, and

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[1] See also, *Cannon v. Group Health Serv. of Okla., Inc.*, 77 F.3d at 1271 and *Corcoran v. United Healthcare, Inc.*, 965 F.2d at 1338, cited above at p. 3.

is "a rule of law governing the insurance relationship distinctively." *Id.* 526 U.S. at 373.

The insurance bad-faith tort was created by the California Supreme Court in 1958 in *Comunale v. Traders & General Ins. Co.*, 50 Cal.2d 654, 328 P.2d 198 (1958), which allowed a policyholder to recover in tort for his insurer's wrongful refusal to settle a third-party claim. The concept was expanded to "first-party" claims by a policyholder against the carrier in 1973. *Gruenberg v. Aetna Ins. Co.*, 9 Cal.3d 566, 575, 108 Cal.Rptr. 480 (1973). See *Copesky v. Superior Court*, 229 Cal.App.3d 678, 685, 280 Cal.Rptr. 338 (1991)(explaining history of the tort).

In the early 1980s, California's intermediate appellate courts allowed terminated employees to sue their employers in tort for breach of the implied covenant, but the California Supreme Court overruled these decisions in *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 684, 254 Cal.Rptr. 211 (1988).

Foley explained that, because the implied covenant is a contract term, recovery for its breach is generally limited to contract damages — but insurance contracts formed an exception to this rule. 47 Cal.3d at 684, 254 Cal.Rtpr. at 228. The court further explained that this exception for insurance contracts developed for a variety of policy reasons that arise from the unique relationship between an insurer and policyholder. *Id.*, 47 Cal.3d at 684, 685, 254 Cal.Rtpr. at 228, 229.

Recent decisions of the California Supreme Court confirm that the bad-faith tort is limited to

the insurance context. In 1995, the court overruled one of its own earlier cases, which had suggested that breach of a contract could be tortious in some circumstances beyond the insurance context. *Freeman & Mills, Inc.*, 11 Cal.4th at 103, 44 Cal.Rptr. 2d at 441(overruling *Seaman's Direct Buying Service v. Standard Oil Co.*, 36 Cal.3d 752 (1984).

In 1999, the court held in *Cates Construction Co. v. Talbot Partners*, 21 Cal.4th 28, 86 Cal.Rptr.2d 855 (1999) that breach of a surety contract did not subject the surety to liability in tort because a surety contract was not an insurance contract. *Cates* explained, "At present, this Court recognizes only one exception to that general rule: tort remedies are available for a breach of the covenant in cases involving insurance policies." *Id.* 21 Cal.4th at 45, 86 Cal.Rtpr.2d 866.

A year later, the court clarified that the bad-faith tort is designed specifically to regulate the conduct of insurers. In *Kransco v. American Empire Surplus Lines Ins. Co.*, 23 Cal.4th 390, 402, 97 Cal.Rptr.2d 151 160 (2000), the court held that although the implied covenant is a "two-way street," only an insurer's breach of the covenant is governed by tort principles.

Because California's bad-faith tort exists only to regulate the conduct of insurers, it satisfies the two-part test to determine whether a state law regulates insurance within the meaning of the saving clause, which was explained in *Ward*. That test asks first, whether, from a common-sense view of the matter, the law at

issue regulates insurance. 526 U.S. at 367. This answer is then checked against the criteria used to determine whether a state law regulates the business of insurance within the meaning of the McCarran-Ferguson Act. 526 U.S. at 373.

Here, since the law exists to regulate insurer conduct, is founded on public-policy concerns unique to the insurance industry, and is available only against insurers, the law plainly regulates insurance from the perspective of common sense.

Likewise, it handily satisfies two of the three McCarran-Ferguson factors – it directly affects the policy relationship between the insurer and its insured, and it is limited in its application to entities within the insurance industry. *Ward*, 526 U.S. at 374-375, 119 S.Ct. at 1389.

CONCLUSION

ERISA was not intended by Congress to be an instrument of injustice, and if construed in accordance with the language that Congress used in the statute, it need not be. Hower respectfully requests that the Court grant the petition.

Respectfully submitted,

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APPENDIX A

[Filed May 02, 2002]

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-55467
D.C. SA CV-00-00987-GLT

JEANETTE C. HOWER,

Plaintiff-Appellant,

v.

PACIFICARE OF CALIFORNIA, AND PACIFICARE OF HEALTH SYSTEMS, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Gary L. Taylor, District Judge, Presiding

Submitted April 4, 2002*
Pasadena, California

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* The panel unanimously finds the case suitable for decision without oral argument. Fed. R. App. 34(a)(2).

MEMORANDUM**

Before: FERNANDEZ and RAWLINSON, Circuit Judges, and REED, District Judge.***

Jeannette Hower ("Hower") filed a lawsuit alleging tortious breach of the implied covenant of good faith and fair dealing when her insurance company, Pacificare of California, failed to refer her to specialists who could properly treat her Lyme disease. Pacificare removed the case to federal court, and filed a motion to dismiss on the basis that Hoover's claims were preempted by ERISA. Hoover moved to remand the case to state court, arguing that the tortious breach of the implied covenant of good faith and fair dealing fit under the insurance savings clause in ERISA. The parties are otherwise familiar with the facts, and we do not repeat them here.

The district court held that Hower's cause of action was preempted by ERISA, 29 U.S.C § 1144(a), because it was a law that regulated insurance, but that it was not saved, because of the Supreme Court's decision in Pilot Life Ins. Co., v. Dedeaux, 481 U.S. 41, 57 (1987) and the Ninth Circuit's decisions in Parrino v FHP, Inc., 146 F.3d 699, 704-05 (9th Cir. 1998) and Kanne v. Connecticut General Life Ins. Co., 867 F.2d 489, 494 (9th Cir. 1988). The court granted

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** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

*** The Honorable Edward C. Reed, Jr., Senior United States District Judge for the District of Nevada, sitting by designation.

Pacificare's motion to dismiss for failure to state a claim.

Hower's argument that her claim is not preempted by ERISA :directly challenges the Supreme Court's decision in Pilot Life, and the prevailing law in the Ninth Circuit which states that a claim for breach of the implied covenant of good faith and fair dealing of an insurance contract is preempted by ERISA. See e.g. Bast v. Prudential Ins. Co. of Am., 150 F.3d 1003, 1007-08 (9th Cir. 1998); Parrino, 146 F.3d at 704-05; Crull v. GEM Ins. Co., 58 F.3d 1386, 1390-91 (9th Cir. 1995); Tingey v. Pixley-Richards West, Inc., 953 F.2d 1124, 1133 (9th Cir. 1992); see also Olson v. General Dynamics Corp., 960 F.2d 1418 (9th Cir. 1992); Kanne, 867 F.2d at 494.

Further, our jurisprudence explicitly states that the civil enforcement provision of ERISA is meant to be exclusive. Crull, 58 F.3d at 1390-91. A claim for breach of the implied covenant of good faith and fair dealing provides a remedy that is outside the scope of ERISA's civil enforcement provisions, and therefore, is not allowed. Pilot Life Ins. Co. 481 at 57.

AFFIRMED.

APPENDIX B

[Filed
January 11, 2001]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

No. SA CV-00-987-GLT (EEx)

JEANETTE C. HOWER

Plaintiff,

v.

PACIFICARE OF CALIFORNIA , ET AL.

Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND DENYING PLAINTIFF'S MOTION TO REMAND

Defendants' Motion to Dismiss is GRANTED with leave to amend within 20 days. Plaintiff's Motion to Remand is DENIED.

Plaintiff brings this action for breach of the implied covenant of good faith and fair dealing based on her health insurance provider's refusal

to refer Plaintiff to a medical specialist. Plaintiff was covered by an employer-sponsored ERISA plan. Defendants Pacificare of California and Pacificare Health Systems removed this case based on ERISA preemption, and they move to dismiss the case on the same basis. Plaintiff argues ERISA does not preempt her cause of action, and she moves to remand the case to the state's Superior Court,

ERISA preempts "any and all State Laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). However, ERISA's "savings clause" exempts certain laws from preemption. It states, "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking or securities." 29 U.S.C. § 514 (b) (2) (A).

The Supreme Court requires a two-step analysis to determine whether a law "regulates insurance" within the meaning of ERISA's "savings clause." See UNUM Life Ins. Co. v. Ward, 526 U.S. 358, 366 (1999). First, from a "common-sense view" it must be shown the law regulates insurance. Id. Second, the law must fit within the "business of insurance" under the McCarran-Ferguson Act, 15 U.S.C. § 1011 et seq., which considers whether the law: (1) transfers a policyholder's risk, (2) is an integral part of the policy-relationship, and (3) is limited to the insurance industry. Id. (citing Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 743 (1985)). These factors are "guideposts," not "separate essential elements." Id. at 374. After

considering the factors under the McCarran-Ferguson Act, the Supreme Court requires a determination as to whether the state cause of action seeks remedies which Congress intended to be preempted by ERISA's civil enforcement provisions under § 502 (a). See Pilot Life Ins. Co. v. Dedeaux, 481 U.S, 41, 51-52 (1987).

The Ninth Circuit held ERISA completely preempts claims for breach of the covenant of good faith and fair dealing before the Supreme Court heard Ward. See Parrino, 146 F.3d at 703; Kanne v. Connecticut General Life Ins. Co., 867 F.2d 489, 493-494 (9th Cir. 1989). Some district courts in other circuits considering a tort claim in the insurance context after Ward have held the "savings clause" prevents preemption of such claims. See Hill v. Blue Cross Blue Shield of Alabama, 117 F.Supp.2d 1209 (N.D. Ala. 2000), Selby v. Principal Mutual Life Ins. Co., 2000 WL 178191, *3 (S.D.N.Y 2000); Lewis v. Aetna U.S. Healthcare, Inc., 78 F.Supp.2d 1202, 1215 (N.D. Okla. 1999) (finding common law bad faith claim regulates insurance under ERISA's savings clause). Two of these published, out-of-circuit cases dealt with tort claims brought under statutes that were "specifically directed towards the insurance industry," not common law. Selby at *1. See also Hill, 117 F.Supp.2d at 1212 (Alabama codified its common law tort of bad faith when it passed the Alabama Insurance Trace Practices Act."). The third relied on the "history, express terms, and consistent application" of the plaintiff's cause of action in ruling "the purpose

and effect of [the] State rule is to 'regulate insurance.'" Lewis, 78 F.Supp.2d at 1205.

Plaintiff brings this claim, not under a State statute, but under common law. She argues that, for all practical purposes, the California Supreme Court has limited recovery in tort for the breach of the covenant of good faith and fair dealing ("bad faith") to insurance policies. However, this is not entirely the case. In dicta, the California Supreme Court did state, "At present this court recognizes only one exception to [the] general rule [that tort remedies are not available in a breach of contract case]: tort remedies are available for breach of the covenant [of good faith and fair dealing] in cases involving insurance policies." Cates Construction, Inc. v. Talbot Partners, 21 Cal. 4th 28, 45 (1999). However, later in the opinion, the court indicated it might consider allowing tort recovery for "contract[s] otherwise marked by elements of adhesion, public interest, or fiduciary responsibility, such that an extracontractual remedy is necessitated in the interests of social policy." Id. at 60. In an earlier case, the California Supreme Court stated some of its previous opinions "contain[ ] language that strongly suggests courts should limit tort recovery in contract breach situations to the insurance area." Freeman & Mills. Inc. v. Belcher Oil Co., 11 Cal.4th 85, 95 (1995). However, it appears the California Supreme Court has never expressly ruled bad faith claims are only actionable in insurance cases. Therefore, it cannot be said California's common law bad faith tort claim is definitively a law which "regulates insurance."

In applying the test set out in Ward for determining whether Plaintiff's claim falls within the "savings clause," the Court must determine if California's common law bad faith tort claim is a law that "regulates insurance" for the purposes of ERISA's savings clause. From a "common-sense view," bad faith claims do not appear to regulate insurance specifically. All contracts include an implied covenant of good faith and fair dealing. See Communal v. Traders and General Ins. Co., 50 Cal.2d 654, 658 (1958); Gruenberg•v. Aetna Ins. Co., 9 Cal.3d 566, 573 (1973). As explained above, there is no definitive case holding bad faith tort remedies are limited to insurance cases. Under that current state of the law, a bad faith claim in California has "its roots in general principals of tort and contract law," Pilot Life, 481 U.S. at 50-51. In addition, although the California Supreme Court has only allowed tort damages for bad faith claims in the insurance context, see Cates, 21 Cal.4th at 60, tort damages affect-only the remedy, not the parties' obligations. See Pilot Life 481 U.S. at 51-53. In other words, the common law rule is not limited to the insurance context.

Next, California's common law bad faith tort claim does not fit within the "business of insurance" as determined by the McCarran-Ferguson Act factors. Ward, 526 U.S. at 366. First, the implied covenant of good faith and fair dealing does not affect the transfer or spreading of risk. Second, it is not an "integral part of the relationship between insurer and insured," Id., because it does not "change[ ] the bargain"

between them or "create[ ] a mandatory contract term." Id. at 374-375. The application of the third factor is more questionable. As explained above, tort remedies may be limited to the insurance context, see Cates, 21 Cal.4th at 60, even though bad faith claims may be brought in any dispute involving a contract. In sum, the common law bad faith tort claim is not a state law regulating insurance which is saved from ERISA preemption.

Plaintiff contends she has been harmed because or a deprivation of benefits under the plan in that she suffered injury due to Defendants improper refusal to refer her to a specialist. Because Plaintiff's cause of action is "predicated upon alleged defects in [Defendants) procedures" for denying health care benefits, Parrino, 146 F.3d at 703-704, the cause of action falls within the scope of Section 502(a)(1)(B) of ERISA.

Defendants' Motion to Dismiss is GRANTED with leave to amend within 20 days to state an ERISA case. Plaintiff's Motion to Remand is DENIED.

Dated: January 11, 2001.

/s/ Gary L. Taylor
GARY L. TAYLOR
United States District Judge

APPENDIX C

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR
CHAPTER 18--EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
SUBCHAPTER I--PROTECTION OF EMPLOYEE BENEFIT RIGHTS
SUBTITLE B--REGULATORY PROVISIONS
PART 5--ADMINISTRATION AND ENFORCEMENT

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§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), or (6) of subsection (c) of this section

or under subsection (i) or (l) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title [FN1] or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to

assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if--

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of

such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(3) The Secretary is not authorized to enforce under this part any requirement of part 7 against a health insurance issuer offering health insurance coverage in connection with a group health plan (as defined in section 1191b(a)(1) of this title). Nothing in this paragraph shall affect the authority of the Secretary to issue regulations to carry out such part.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title or section 1021(e)(1) of this title with respect to a participant or

beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be

filed with the Secretary under section 1021(b)(4) of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $1,000 for each violation by any person of section 1021(f)(1) of this title.

(5) The Secretary may assess a civil penalty against any person of up to $1,000 a day from the date of the person's failure or refusal to file the information required to be filed by

such person with the Secretary under regulations prescribed pursuant to section 1021(g) of this title.

(6) If, within 30 days of a request by the Secretary to a plan administrator for documents under section 1024(a)(6) of this title, the plan administrator fails to furnish the material requested to the Secretary, the Secretary may assess a civil penalty against the plan administrator of up to $100 a day from the date of such failure (but in no event in excess of $1,000 per request). No penalty shall be imposed under this paragraph for any failure resulting from matters reasonably beyond the control of the plan administrator.

(7) The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1320b-14(c)(8) of Title 42.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a

court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant,

beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant,

beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan--

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of--

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of the Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of Title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(l) Civil penalties on violations by fiduciaries

(1) In the case of--

(A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other

person with respect to a breach or violation described in paragraph (1)--

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that--

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9) of this section) without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

(m) Penalty for improper distribution

In the case of a distribution to a pension plan participant or beneficiary in violation of section 1056(e) of this title by a plan fiduciary, the Secretary shall assess a penalty against such fiduciary in an amount equal to the value of the distribution. Such penalty shall not exceed $10,000 for each such distribution.

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§ 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

(5)(A) Except as provided in subparagraph (B), subsection (a) of this section shall not apply to the Hawaii Prepaid Health Care Act (Haw.Rev.Stat. § § 393- 1 through 393-51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a) of this section--

(i) any State tax law relating to employee benefit plans, or

(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent they govern matters which are governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after January 14, 1983), but the Secretary may enter into cooperative arrangements under this paragraph and section 1136 of this title with officials of the State of Hawaii to assist them in effectuating

the policies of provisions of such Act which are superseded by such parts 1 and 4 and the preceding sections of this part.

(6)(A) Notwithstanding any other provision of this section--

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides--

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 1002(1) and section 1003 of this title necessary to be considered an employee welfare benefit plan to which this subchapter applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which

the provisions of this subchapter apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

(7) Subsection (a) of this section shall not apply to qualified domestic relations orders (within the meaning of section 1056(d)(3)(B)(i) of this title), qualified medical child support orders (within the meaning of section 1169(a)(2)(A) of this title), and the provisions of law referred to in section 1169(a)(2)(B)(ii) of this title to

the extent they apply to qualified medical child support orders.

(8) Subsection (a) of this section shall not be construed to preclude any State cause of action--

(A) with respect to which the State exercises its acquired rights under section 1169(b)(3) of this title with respect to a group health plan (as defined in section 1167(1) of this title), or

(B) for recoupment of payment with respect to items or services pursuant to a State plan for medical assistance approved under title XIX of the Social Security Act [42 U.S.C.A. § 1396 et seq.] which would not have been payable if such acquired rights had been executed before payment with respect to such items or services by the group health plan.

(9) For additional provisions relating to group health plans, see section 1191 of this title.

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(c) of this title) or any rule or regulation issued under any such law.